A

RE NOR AZAH AWIN; EX P LEE SWEE ENG; BANK PERUSAHAAN KECIL & SEDERHANA MALAYSIA BHD (INTERVENER)

HIGH COURT MALAYA, KUALA LUMPUR
B AZIZAH NAWAWI JC
[BANKRUPTCY NO: 29-4887-10-2011]
14 DECEMBER 2012

BANKRUPTCY: *Practice and procedure - Locus standi - Leave to*
C *intervene - Failure to apply for leave to intervene - Whether mere procedural irregularity - Whether court could allow reliefs claimed - Bankruptcy Act 1967, s. 8(1)*

BANKRUTPCY: *Receiving order - Locus standi - Application to proceed against bankrupt - Whether leave of bankruptcy court required -*
D *Whether claim for unsecured monetary amount and provable in bankruptcy - Whether proof of debt required - Whether expectancy or possibility of an interest amounted to interest in property - Bankruptcy Act 1967, ss. 8(1), 40(3)*

E The appellant ('SME Bank') and the respondent ('Taiping') were the plaintiffs in a suit against one Nor Azah binti Awin ('the JD'). In the suit, Taiping sought to recover contra losses against the JD and a consent judgment was entered between Taiping and the JD. Taiping was also claiming for further relief to satisfy the contra
F losses by a transfer of the JD's four pieces of land in Terengganu ('the said properties'). SME Bank, through an action to intervene, claimed for registrable interest in the said properties pursuant to a loan granted to redeem the properties from Danaharta. However, before the trial of the suit, the JD was made a bankrupt resulting
G in an application in encl. 32 by Taiping for leave to proceed with the suit under s. 8(1) of the Bankruptcy Act 1967 ('the Act') whilst SME Bank applied for leave to intervene and oppose encl. 32 ('encl. 36'). The learned Senior Assistant Registrar ('SAR') allowed Taiping's application in encl. 32 and dismissed
H SME Bank's application in encl. 36. Hence, this notice of appeal in encl. 50 by SME Bank against the decision of the SAR. The issues raised by the parties were: (i) whether SME Bank should be allowed to intervene; (ii) whether Taiping's application was defective as it did not apply to intervene in the bankruptcy
I proceedings before applying for leave under s. 8(1) of the Act; and (iii) whether, on the merits of the application, leave should be granted to Taiping to proceed with the suit under s. 8(1) of the Act.

Held (allowing appeal in encls. 36 and 50 and dismissing encl. 32 with costs):

(1) The failure to intervene is not a mere procedural irregularity that can be cured by the court's inherent powers. *Locus standi* is substantive law. Unless and until the person is properly before the court, the court cannot hear him, let alone grant him reliefs. (para 17)

(2) On the facts, the bankruptcy action was between the JC and the JD and therefore, an outsider must apply for leave to intervene in order to intrude into these proceedings. The application by Taiping in encl. 32 was not for leave to intervene, but to apply for leave to proceed with the suit under s. 8(1) of the Act. As such, the application was defective. (paras 15 & 16)

(3) SME Bank had prayed to apply for leave to intervene in the bankruptcy proceeding and had complied with the test enunciated in *Pegang Mining Ltd v. Choong Sam & Ors*. SME Bank had an equitable as well as registrable interest over the said properties which would be affected by any order made by the court by virtue of its payment for the redemption of the properties. (para 18)

(4) Although it was undisputed that Taiping had secured a consent judgment for a liquidated sum for the contra losses against the JD, the claim was that of an unsecured monetary amount and as such was debts provable in bankruptcy under s. 40(3) of the Act. Therefore, the only recourse for Taiping was to lodge a proof of debt (*RNC Corporation Bhd v. Kesvaran TP Murugasu, foll; Re Ambrose Lee*, foll). (para 25)

(5) Unless there is an enforceable right against the said properties, any monies due and owing could only be claimed by lodging a proof of debt. The fact that the bankrupt had lodged caveats and the same was extended by the court pending an inquiry into the account and the satisfaction of any sum owing, does not make it an enforceable right against the caveated properties (*Re Ngan Kim Yong*, foll). (paras 26, 27 & 30)

(6) Taiping's consent order was for a liquidated sum for the contra losses and it had no enforceable rights against the said properties. Taiping's expectation was to secure the said properties to satisfy the contra losses. However, a mere

A expectancy or possibility of an interest is not an interest in property (*Agroco Plantation Sdn Bhd & Anor v. Besharapan Sdn Bhd & Ors*, refd). As such, it was "not yet an interest in the said property" and it could not be said to be an interest in property. In the circumstances, Taiping could not be said to
B have an enforceable right against the said property and its rights, *vide* the consent order for a liquidated sum, remained that of an unsecured creditor. (paras 31, 32 & 33)

Case(s) referred to:
C *Agroco Plantation Sdn Bhd & Anor v. Besharapan Sdn Bhd & Ors [1998] 5 CLJ 19 HC* ***(refd)***
IZA Construction Co Sdn Bhd v. Law Fatt Choon [2011] 1 LNS 1726 CA ***(refd)***
Joseph Ambrose Lee & 2 Ors v. Mayban Securities Sdn Bhd [1005] 1 LNS 362 ***(foll)***
D *Pegang Mining Company Ltd v. Choong Sam & Ors [1968] 1 LNS 96 PC* ***(refd)***
Re Ngan Kim Yong [1975] 1 LNS 149 HC ***(foll)***
RNC Corporation Bhd v. Kesvaran TP Murugasu [2009] 5 CLJ 110 CA ***(foll)***

E **Legislation referred to:**
Bankruptcy Act 1967, ss. 8(1), 40(3)
Companies Act 1965, s. 263(2)

For the appellant - S Maniarasan (Adam Abdullah with him); M/s Adam Abdullah & Mani
F *For the respondent - JH See (Rehna with him); M/s Belden*

Reported by S Barathi

G

JUDGMENT

Azizah Nawawi JC:

Application

H **[1]** Enclosure (50) is the Bank Perusahaan Kecil & Sederhana Malaysia Bhd (SME Bank) notice of appeal to judge in chambers dated 22 October 2012 against the decision of the learned Senior Assistant Registrar (the SAR) in respect of two applications:

I (i) an application by Taiping Recovery Sdn Bhd ("Taiping") for leave to continue its proceedings in Suit D3-22-2913-1999 (the "suit") (encl. 32 dated 2 July 2012); and

(ii) an application by SME Bank for leave to intervene and to oppose encl. 32. (encl. 36 dated 24 July 2012).

[2] In her decision given on 9 October 2012, the learned SAR allowed Taiping's encl. (32) and dismissed SME Bank's application in encl. (36).

The Salient Facts

[3] Both SME Bank and Taiping are plaintiffs in Suit D3-22-2913-1999. One of the defendants in the said suit is the judgment debtor, Nor Azah Awin (the "JD").

[4] Taiping's claim is to recover contra losses, in the sum of RM29,304,802.85 against the JD. On 11 June 2010, a consent judgment was entered between Taiping and the JD. In addition to the claim for the contra losses, Taiping is also claiming for further relief to satisfy the contra loss by a transfer of four pieces of land in Terengganu (the "said properties") to a Malay or a Malay company to be appointed by Taiping. (See exh. "WWF1" annexed to Taiping's affidavit). The JD is the registered owner of the four pieces of land in Terengganu.

[5] SME Bank applied to intervene in the same suit and was made the second plaintiff. SME Bank's cause of action is to secure itself as the chargor to the said four properties in Terengganu, as they have paid RM8 million to redeem the said properties from Danaharta (see exh. "MY13").

[6] The said four properties belonged to the JD. The said properties were charged to Danaharta. SME Bank gave a loan to Dignityview Sdn Bhd ("Dignityview") to buy the properties from the JD by redeeming the charges from Danaharta. By way of a security, the said properties, once transferred to Dignityview, will be charged to SME Bank.

[7] Pursuant to the sale and purchase agreement with the JD, for the purposes of the transfer of ownership from the JD to Dignityview, Form 14A of the National Land Code was duly stamped and lodged with the land office (see exh. "MY11"). Form 16A was also duly executed by Dignityview creating charges in favour of SME Bank over the said four properties (see exh. "MY12"). Upon the payment from SME Bank, Danaharta had discharged its charges on the said properties (see exh. "MY14").

[8] All the said documents, Form 14A, 16A and 16N were lodged with the land office in Setiu, Terengganu (see exh. "MY15").

[9] However, the transfer could not be executed on a technical problem and the charges were not secured in favour of SME Bank. SME Bank said that it has a registrable interest in the said properties.

[10] In the same suit, SME Bank sued the JD and Dignityview over its interests in the said four properties. On 8 August 2012, SME Bank recorded a consent judgment with Dignityview on the term that Dignityview is to create and register charges in favour of SME Bank over the said four properties, once it is registered as the owner.

[11] On 12 June 2012, the JD was made a bankrupt, before the trial of the suit, which is to commence on 17 December 2012.

[12] Enclosure (32) is the application filed by Taiping for leave of court to proceed with the suit under s. 8(1) of the Bankruptcy Act 1967 (Act 360).

[13] Enclosure (36) is SME Bank's application for leave to intervene and to oppose Taiping's application.

Issues

[14] The issues raised by the parties are:

(i) whether SME Bank should be allowed to intervene;

(ii) whether Taiping's application is defective as Taiping did not apply to intervene in the bankruptcy proceedings before applying for leave; and

(iii) whether, on the merits of the application, leave should be granted to Taiping to proceed with the suit under s. 8(1) of Act 360.

The Findings Of The Court

Issues (i) And (ii) - Intervene

[15] It is common ground that this bankruptcy action is between the JC, Lee Swee Eng and the JD, Nor Azah Awin. They are the original parties in this bankruptcy action.

[16] Therefore, if an outsider is to intrude into these proceedings, they must apply for leave to intervene. I take note that Taiping's application in encl. (32) is not for leave to intervene, but to apply for leave under s. 8(1) of Act 360 itself. As such, the application is defective as they failed to apply for leave to intervene in the proceeding, before asking for leave to proceed with the suit. Both Taiping and SME are strangers to this bankruptcy action. Unless and until they are made interveners in this action, they do not have the necessary *locus standi* to ask for relief from this bankruptcy court.

[17] I am also of the considered opinion that the failure to intervene is not a mere procedural irregularity that can be cured by the court's inherent powers. *Locus standi* is substantive law. Unless and until the person is properly before the court, the court cannot hear him, let alone grant him reliefs.

[18] On the other hand, SME Bank's first prayer is to apply for leave to intervene in this bankruptcy proceeding. I am of the considered opinion that SME Bank has complied with the test enunciated in *Pegang Mining Company Ltd v. Choong Sam & Ors* [1968] 1 LNS 96; [1969] 2 MLJ 52. By virtue of their payment of RM8 million to redeem the said properties from Danaharta on the premise that the charges over the said properties were to be registered in their favour, I am of the considered opinion that SME Bank has an equitable as well as a registrable interest over the said properties. As such, its rights will be affected by any order made by the court.

Issue (iii) - Substantive Application

[19] If I am wrong with regard to the application to intervene, I will proceed to consider the substantive application for leave under s. 8(1) of Act 360. Section 8(1) reads:

> 8. Effect of receiving order.
>
> (1) On the making of a receiving order the Director General of Insolvency shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.

[20] Under s. 8(1) of Act 360, the effect of the receiving order granted by the court is to curtail any unsecured creditor whose debts is provable in bankruptcy under s. 40 of Act 360 from having a remedy against the property or the JD himself in respect of the debt. Further, he cannot proceed with or commence any legal action in respect of such debt unless with the leave of the court and on such terms as the court may impose.

[21] Under s. 40(3) of Act 360, debts provable in bankruptcy includes "all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in bankruptcy."

[22] In its application for leave, Taiping submits that leave to proceed should be allowed on three grounds:

(i) that its claim in D3-22-2913-1999 cannot be dealt with adequately in bankruptcy proceedings as its rights to the land is a secured interest;

(ii) that the relief it seeks in the suit is for the tracing of the land titles into the hands of subsequent owners and these prayers cannot be granted on bankruptcy proceedings; and

(iii) that the suit is also to compel the Registrar of the Land Titles to rectify the land title register, which neither this court nor the Director General of Insolvency will be able to grant.

[23] In *IZA Construction Co Sdn Bhd v. Law Fatt Choon* [2011] 1 LNS 1726, the Court of Appeal held that if a party to the proceedings is a bankrupt, the proceedings cannot be proceeded with without leave of the bankruptcy court under s. 8 of Act 360. Since a receiving order has been made against the JD, one of the defendants in the suit, hence this application was made for leave to proceed with the suit.

[24] In *RNC Corporation Bhd v. Kesvaran TP Murugasu* [2009] 5 CLJ 110, the Registrar granted leave pursuant to s. 263(2) of the Companies Act 1965 for Kesvaran to proceed and/or commence legal action against RNC on an *ex parte* application.

RNC sought to set it aside. It was dismissed by the Registrar, and a subsequent appeal was also dismissed by the judge. The appeal to the Court of Appeal was allowed where the court gave its reasons as follows:

> Based on the facts and clear provisions of the law, I am of the view that the leave order should not have been granted. My reasons are these:
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> (i) the relief sought by Kesvaran which is to obtain an unsecured monetary amount should be dealt with by way of proof of debts as part of the liquidation of RNC;
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> (ii) the fact that Kesvaran has an award granted by the Industrial Court should not entitle him to the first cut of the assets of RNC over and above the other creditors;
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> (iii) Kesvaran's unsecured monetary claim should rank *pari passu* ie, equally with the other unsecured creditors;
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> (iv) ...
>
> (v) it would give Kesvaran an advantage over the other creditors in the winding up of RNC, thereby causing prejudice to the other creditors.

[25] In the present application, it is not in dispute that Taiping had secured a consent judgment for a liquidated sum for the contra losses against the JD. The consent judgment entered before YA Justice Dato' Abdul Aziz bin Abdul Rahim is exhibited as "MY21" and reads as follows:

> 11 JUN 2010 (FRIDAY)
> KES NO: D22-2913-1999
> Enclosure 1 - continue trial
> Cik S. Shanti together with En. Adrian See for Plaintiff.
> Pn. Haryati Ibrahim together with Cik Khalisa Badrul for Defendant 4 and Defendant 6.
> En. Jasbeer Singh together with Cik A. Devi for Defendant 5.
> Pn V. Vasugi together with Cik Azura for Defendant 7.
>
> Miss Shanti -
>
> The Plaintiff and the 4th Defendant are able to record a consent judgment on the following term:
>
> (i) By consent of the Plaintiff and the 4th Defendant it is hereby adjudged that the 4th Defendant shall pay the Plaintiff RM29,304,802.85 in full and final settlement of the contra losses with no order as to cost and interest.

A Court -

Pn Haryati can you confirm the term.

Pn Haryati -

B Yes My Lord. I confirm the term.

Court -

By consent judgment for the Plaintiff against the 4th Defendant on the agreed term as above.

C …

[26] As such, based on the consent judgment entered, I am of the considered opinion that Taiping's claim is that of an unsecured monetary amount, and as such are debts provable in bankruptcy D under s. 40(3) of Act 360. Therefore, the only recourse for Taiping is to lodge a proof of debt. In *Joseph Ambrose Lee & 2 Ors v. Mayban Securities Sdn Bhd* [1005] 1 LNS 362; [2005] 7 MLJ 483, Linton J held that leave under s. 8(1) of Act 360 should not have been granted to a creditor to recover a liquidated E sum of RM11.8 million. The only recourse for the creditor is to lodge a proof of debt.

[27] Based on the decision of the Court of Appeal in *RNC Corporation Bhd (supra)* and in *Re Ambrose Lee (supra)*, leave F under s. 8(1) should not be granted to Taiping. Taiping should instead, lodge a proof of debt.

[28] However, Taiping Sdn Bhd also submitted that in the suit, they are seeking a further prayer that in order to satisfy the contra loss, they are seeking the transfer of the four properties in G Terengganu to a Malay or Malay company nominated by Taiping Sdn Bhd. This is what they meant by an interest in the land. Taiping's prayers against the JD, as the fourth defendant, in (1) to (4F) of the suit read:

H Further and/or alternatively, as against the Fourth Defendant:

(1) the sum of RM29,304,802.85 being the contra losses under the Accounts;

(2) the sum of RM7,258,130.32 being interest …;

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(3) interest at the rate …;

(4) interest on the outstanding sum …

(4A) That the Fourth Defendant do satisfy the contra loss adjudged by transferring ~~alternative to prayers (1) to (4) above, specific performance of the Settlement Agreement dated 1.12.1997 for the transfer from the Fourth Defendant to the Plaintiff~~ of the pieces of land known as Lots 141 (GM41), 142 (GM161), 144 (GM254) and 146(GM166) in Mukim Merang, Daerah Setiu, Tempat Wakaf Ru Tapai, Negeri Terengganu ("the Properties") to a Malay person or Malay holding company nominated by the Plaintiff in specific performance of the Settlement Agreement dated 1.12.1997;

(4B) consequent to (~~4~~A), the Fourth Defendant do carry out all acts, execute and deliver to a Malay person or Malay holding company nominated by the Plaintiff within 24 hours of the judgment herein or such time as this Honourable Court deems fit, all deeds, instruments and documents, including the Memorandum of Transfer and all other documents that are required for the registration of the transfer in favour of Fourth Defendant do carry out all acts, execute and deliver to a Malay person or Malay holding company nominated by the Plaintiff together with the issue document of title relating the said Properties;

(4C) consequent thereto, the Fourth Defendant do deliver up to a Malay person or Malay holding company nominated by the Plaintiff, within 3 days from the date of judgment herein or such time as this Honourable Court deems fit, vacant possession of the Properties;

(4D) further thereto, the Registrar of the Terengganu Land Office be directed to effect the transfer of the said Properties to a Malay person or Malay holding company nominated by the Plaintiff;

(4E) further or alternatively ~~thereto~~, that the Fourth Defendant do P~~laintiff be permitted to~~ sell the Properties, and the value of the sale thereof, less costs incurred for the sale, be accounted for in diminution of the contra losses and interests adjudged;

(4F) judgment be entered against the Fourth Defendant in respect of the shortfall, if any, between the sale value of the Properties and PT 1143 (less costs of the sale) and the contra losses and interests adjudged;

[29] In *Re Ngan Kim Yong* [1975] 1 LNS 149; [1976] 2 MLJ 22, the bankrupt and Sit Yu Yoong are partners in Eastern Building Company. The bankrupt has lodged private caveats on the properties of Sit Yu Yoong for some monetary claims against Sit

Yu Yoong over the business partnership. Sit Yu Yoong was adjudged bankrupt on 17 August 1973. In allowing an application by the official assignee for the removal of the private caveats lodged by the bankrupt, Justice Abdoolcader said as follows:

> It is clear that in view of the bankruptcy of Sit Yu Yoong the bankrupt no longer has any remedy against any properties belonging to her bankrupt partner, and if ultimately any moneys are in fact found due to the bankrupt from Sit Yu Yoong on accounts taken pursuant to the order of April 1, 1968, the bankrupt would only be able to claim in the bankruptcy of Sit Yu Yoong by lodging a proof of debt. She would have no enforceable right against the caveated properties.
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> ...
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> On further argument, Mr. Lim Cho Hock, appearing for the bankrupt, submitted that there was an Order made in Civil Suit No. 296 of 1966 on December 16, 1969, extending the period of the private caveats lodged by her and ordering them to remain in force until the disposal of the enquiry into the accounts of the partnership and satisfaction of any sum found due to the bankrupt. Mr. Lim Cho Hock also then agreed that the bankrupt has no right against the caveated properties. The short answer to the point raised about the Order of December 16, 1969, which I have referred to is that the **bankruptcy of Sit Yu Yoong has radically changed the position, resulting in the bankrupt having no right against the caveated properties**, and it is furthermore open to the Official Assignee, who has stepped into the shoes of the bankrupt by virtue of her bankruptcy, to ask for a withdrawal of the caveats in the circumstances, as indeed it would be open to her to do at any time notwithstanding the Order of December 16, 1969.
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> In the *circumstances and in view of the bankruptcy of Sit Yu Yoong, it is abundantly clear that the bankrupt no longer has any remedy against the property of Sit Yu Yoong and her only recourse in the event of any claim against her bankrupt partner would be to join the general pool of unsecured creditors in the bankruptcy of Sit Yu Yoong.* ... (emphasis added)

[30] It is very clear from *Re Ngan Kim Yong*, that unless there is an enforceable right against the said properties, any moneys due and owing could only be claimed by lodging a proof of debt. The fact that the bankrupt had lodged caveats and the same was extended by the court pending an inquiry into the account and the satisfaction of any sum owing, does not make it an enforceable right against the caveated properties.

[31] Taiping's position is similar to the bankrupt in *Re Ngan Kim Yong (supra)*. Taiping's consent order is for a liquidated sum for the contra losses. Taiping has no enforceable rights against the JD's four properties in Terengganu. It is to be noted that Taiping's initial prayer was for specific performance of the settlement agreement dated 1 December 1997 for the transfer of the said properties, but this had since been amended and deleted. Further, there is no settlement agreement dated 1 December 1997 before this court. So the claim here is only for the contra losses, which had since been secured in the consent judgment dated 11 June 2010, as in para. [25] above.

[32] I am also of the opinion that from prayer (4A) of the suit, Taiping's expectation is to secure the four properties in Terengganu to satisfy the contra losses. However, a mere expectancy or possibility of an interest is not an interest in property. In *Agroco Plantation Sdn Bhd & Anor v. Besharapan Sdn Bhd & Ors* [1998] 5 CLJ 19, Justice Richard Malanjum took note of some of the pertinent principles in bankruptcy law at pp. 28-29, which are as follows:

> ... The object of bankruptcy law is that every beneficial interest which a bankrupt has, everything belonging to him which can pass from him to his trustee and which can be turned to profit, should be divisible among his creditors. The property of the person who is adjudicated a bankrupt passes away from him on the adjudication, and becomes vested in his trustee and divisible among his creditors, with the exception (1) of property held by him in trust for any other person; (2) of the tools of his trade and the necessary wearing apparel and bedding of himself, his wife and his children, to a value, inclusive of tools and apparel and bedding, not exceeding £20 in the whole; (3) of property which is by statute specially exempted from passing to the trustee; and (4) of property which by its nature is incapable of passing.
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> ...
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> Expectancies. A mere expectancy or possibility of an interest is not property, and if it remains a possibility or expectancy while the bankruptcy lasts, it does not become divisible among the creditors; but if it becomes an actual interest during the bankruptcy, it is divisible among the creditors.
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> A possibility coupled with an interest passes on bankruptcy.

A **[33]** From prayers 1 - 4F of Taiping's claim, I am of the considered opinion that the same is only 'a mere expectancy or possibility of an interest in the four properties'. As such it is "not yet an interest in the said property". Therefore, if it cannot be said to be an interest in property, Taiping cannot be said to have
B an enforceable right against the said property. Taiping's rights, *vide* the consent order for a liquidated sum, remain that of an unsecured creditor.

[34] Based on the reasons above, I will allow the appeal in
C encl. (50), and set aside the decision of the learned SAR. Enclosure (36) is allowed and encl. (32) is dismissed with costs.

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